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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANGEL MIKE CHAPA, Defendant and Appellant.	F075097 (Super. Ct. No. PCF323529) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Antonio A. Reyes, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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See Concurring and Dissenting Opinion.

Angel Mike Chapa was convicted of attempted murder, assault with a firearm, attempted second degree robbery, and possession of a firearm by a felon. He challenges his convictions for assault with a firearm and attempted murder for insufficiency of the underlying evidence. We will reverse his conviction for assault with a firearm and affirm his conviction for attempted murder. Chapa also challenges the imposition of a $10 fine by the trial court. The People concede the point. We will strike the fine. Finally, Chapa requests remand for resentencing in light of Senate Bill No. 620, which made the imposition of certain firearm enhancements discretionary rather than mandatory, and Senate Bill No. 1393, which similarly made imposition of prior serious felony enhancements discretionary rather than mandatory. We will remand for resentencing with respect to the firearm enhancements imposed in connection with the attempted murder and attempted robbery convictions, as well as with respect to the imposition of a prior serious felony enhancement as part of Chapa's sentence. In all other respects, the judgment is affirmed.

PROCEDURAL HISTORY

Chapa was charged, by an information filed in the Tulare County Superior Court, with premeditated attempted murder (count 1, Pen. Code, §§ 187, subd. (a), 664);[1] assault with a firearm (count 2, § 245, subd. (a)(2)); attempted second degree burglary (count 3, §§ 211, 664); and possession of a firearm by a felon (count 4, § 29800, subd. (a)). The information further alleged, as to counts 1 through 3, that Chapa personally used a firearm in the commission of the offense. (§§ 12022.53, subd. (b), 12022.5, subd. (a)(1).) In addition, the information alleged that Chapa had a prior serious felony and strike conviction. (§§ 667, subd. (a)(1), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

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1 Subsequent statutory references are to the Penal Code unless otherwise specified.

Chapa was convicted of all counts at jury trial, but the jury rejected the premeditation allegation attached to the attempted murder charge. The jury found true the firearm enhancements attached to counts 1 through 3. In a bifurcated proceeding, the court found true the prior conviction allegations.

Chapa was sentenced to 29 years in prison on the attempted murder conviction. His sentences on all the other convictions were stayed pursuant to section 654.

FACTS

This case stems from an incident that took place at a market in Plainview, Tulare County, on August 14, 2015, at approximately 12:30 p.m. The evidence at trial consisted solely of the testimony of Imtiaz Khalid, the cashier at the market, and a video recording from the store's video surveillance cameras.

Testimony of Imtiaz Khalid

Khalid testified Chapa had previously been a customer at the store. Chapa "was not a regular" but would come in to cash checks whenever he had work. Khalid described the check-cashing aspect of the market's business. He testified: "So if the check amount is more than a hundred, we pay from the pocket; and if the amount is less than a hundred, we pay from the register."

Regarding the incident in question, Khalid testified: "I was standing behind the register; was waiting for the customers. Angel Chapa ran into the store from outside. He was … holding gun in his hand, but it was down hanging. But when he came in front of me, he pulled his gun out and point on me." Chapa said, "Give me money from your pocket." Khalid responded: "I will open the register. You can get [the money]." At that point, Chapa pulled the gun's trigger but nothing happened; the gun did not fire.

Khalid testified: "I again said, 'If you need money, I will open the register, you can get it.'" In response, Chapa repeated, "'Give me money from your pocket.'" Khalid had money in his pocket but did not turn it over to Chapa. Chapa pulled the trigger for a second time. Once again there was no fire. Chapa fiddled with the gun. Khalid

explained: "I don't know actually what he did, but he did [something] and spoke the word to the gun 'stupid.'"

Khalid continued: "Third time he had said 'Give me the money' and pulled the trigger." Again, the gun did not fire. Khalid "tried to snatch the gun." Khalid's "hand touched the gun, but [he] could not hold it." "[Chapa] ran away after that." "He ran into a white car and [sat] on the passenger side."

Khalid testified that the gun felt like a "real gun," in that it seemed to be made of metal. The gun was a revolver; Khalid was familiar with revolvers, having owned one in the past. When Chapa pulled the trigger, Khalid saw the hammer of the gun fall but he could not say whether the cylinder moved. Khalid acknowledged he had "no idea" about replica firearms made of metal. Khalid said most of the time Chapa had the gun pointed at Khalid, though at times the gun was pointed to the side. As for whether the gun was loaded, Khalid testified: "I don't know because there was no firing." Nor did Khalid see any bullets in the cylinder. The interaction was very quick and stressful. Khalid thought he was going to be shot.[2]

Video Evidence

The prosecution showed a video clip of the incident. The video, which has no sound accompanying it, shows Chapa run into the store. Chapa points a gun at Khalid and appears to ask for something. He manipulates the gun at one point. When Khalid reaches across the counter to grab the gun, Chapa runs away. Khalid immediately runs out after Chapa. The entire incident is extremely brief.

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[2] The revolver referred to in testimony was never offered into evidence and was presumably never recovered.

DISCUSSION

Sufficiency of Evidence to Support Chapa's Conviction for Assault with a Firearm

Chapa challenges his conviction for assault with a firearm on grounds of insufficient evidence. When the sufficiency of the evidence is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d. 557, 578.)

Chapa was convicted under section 245, subdivision (a)(2)—assault with a firearm. An assault, in turn, is defined in section 240 as "an unlawful attempt, *coupled with a present ability*, to commit a violent injury on the person of another." (§ 240, italics added.) Accordingly, as to the charge of assault with a firearm, the prosecution was required to prove: (1) The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; (2) the defendant did that act willfully; (3) when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and (4) when the defendant acted, he had the present ability to apply force with a firearm to a person. (See CALCRIM No. 875; *People v. Delacerda* (2015) 236 Cal.App.4th 282, 291.) Chapa argues that the evidence was insufficient as to the "present ability" element of assault with a firearm because there was no substantial evidence that the gun used by Chapa was loaded and operable.[3] We agree and will reverse the assault conviction.

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[3] Chapa does not question the sufficiency of the evidence adduced to show the gun was a real gun.

Unlike many other jurisdictions, which require only a subjective or "'*apparent* present ability'" to inflict injury by the means contemplated by the defendant, California requires the existence of "'*objective* present ability'" to inflict the harm attempted by the defendant. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 110.) California's objective standard has survived the test of time. For an assault to occur, a defendant must have "a present ability of using actual violence against the person of another." (*People v. McMakin* (1857) 8 Cal. 547, 548.) The defendant must have "'acquired the means and maneuvered into a location to immediately injure his victim.'" (*People v. Licas* (2007) 41 Cal.4th 362, 370, quoting *Valdez, supra*, at p. 113.)

Accordingly, "threatening to shoot someone with a toy gun or candy pistol does not show the requisite present ability to commit a violent injury." (*People v. Ranson* (1974) 40 Cal.App.3d 317, 321 (*Ranson*).) Similarly, an unloaded or inoperable gun will not provide present ability to commit an assault where it is not being used as a club or bludgeon. (*People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544 [no assault when a person points an unloaded gun at another, without attempting or threatening to use it as a club or bludgeon, because "'there is in such a case no present ability to commit a violent injury on the person threatened *in the manner in which the injury is attempted* to be committed'"]; *Ranson, supra*, at p. 321 ["It is settled in California that pointing an unloaded shotgun does not constitute 'present ability.'"]; *People v. Chance* (2008) 44 Cal.4th 1164, 1172, fn. 7 (*Chance*) [the rule in California is that "assault cannot be committed with unloaded gun, unless the weapon is used as a bludgeon"]; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11 & fn. 3 (*Rodriguez*); *People v. Wolcott* (1983) 34 Cal.3d 92; *People v. Lee Kong* (1892) 95 Cal. 666, 669.) Thus, California law "'cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded,

or whether the party at whom it was menacingly pointed was thereby placed in great fear.'" (*Wolcott*, *supra*, at p. 99, quoting *Lee Kong*, *supra*, at p. 669.)

The jury must find every element of the offense proven beyond a reasonable doubt. (*People v. Cole* (2004) 33 Cal.4th 1158, 1208.) The element in question here was the defendant's present ability to inflict a violent injury with the gun. (See *Rodriguez*, *supra*, 20 Cal.4th at p. 11.) As noted above, a threat to shoot with an unloaded or inoperable gun is not an assault since the defendant would not have the present ability, in *objective* terms, to inflict the threatened injury. Since there is no direct evidence in this case whether the gun was loaded and operable at the time the defendant threatened Khalid, we look to the circumstantial evidence. Therefore, the question before us is whether the circumstantial evidence was such that a reasonable trier of fact could find, beyond a reasonable doubt, that the gun was actually loaded and operable.

Here, Chapa pulled up to the store in a car driven by someone else. Chapa got out and ran into the store. Chapa pointed a gun at Khalid, and repeatedly asked him for the money in his pocket. Khalid offered to open the cash register but did not turn over the money in his pocket. Chapa kept the gun trained on Khalid for the most part. Over the course of the incident, Khalid pulled the trigger of the gun three times. The gun never fired.

Khalid's testimony indicated that Chapa did not pull the trigger continuously. Rather, he pulled the trigger at short intervals, after quick interactions with Khalid. When Chapa pulled the trigger, Khalid saw or heard the hammer of the gun fall but could not say whether the gun's cylinder turned or not. At one point, Chapa appeared to try to twist the center of the gun and called it stupid, but Khalid did not "know actually what he did." When Khalid tried to snatch the gun, rather than attempting to fire it again, Chapa simply ran off to the waiting car, which drove off.

In assessing Chapa's claim of insufficiency of evidence, two cases are instructive: *Rodriguez*, *supra*, 20 Cal.4th 1 and *Ranson*, *supra*, 40 Cal.App.3d 317. *Rodriguez* held

that the defendant's actions and words in putting a gun under the chin of the victim, Merritt, and warning him to keep his mouth shut could reasonably be interpreted as an admission of the present ability to inflict harm. (*Rodriguez, supra,* at p. 12.) However, the surrounding circumstances in *Rodriguez* are not analogous to the situation here. There, the defendant was a gang member who, the previous day, had actually shot and murdered someone in a drive-by shooting that Merritt had witnessed. (*Rodriguez, supra,* at pp. 5-6.) The defendant then confronted Merritt, put a gun to his chin, and warned him, "I could do to you what I did to them." (*Id.* at p. 7.) The circumstances properly justified the requisite inference that the gun was loaded because the defendant was a gang member who carried his gun around on his person, had shot and killed someone the day before, and accosted Merritt, whom he did not know, specifically to dissuade him from going to the police. In contrast, here Chapa actually pulled the gun's trigger three times but the gun did not work. Moreover, rather than continuing to pull the trigger, Chapa ran from the store once Khalid was no longer intimidated by the gun. In addition, there is no evidence to show the gun was operable at the time, such as a showing that it had worked before and/or after the fact.

In *Ranson*, the court delineated a fix-it-fast exception to the present ability element of assault with a firearm, based on the "unique fact situation" presented in that case. (*Ranson, supra,* 40 Cal.App.3d at p. 321.) In *Ranson*, there was uncontroverted, direct evidence that a rifle wielded by the defendant was "loaded and operable." (*Id.* at p. 321.) Upon recovery of the gun by the police, the gun's magazine clip was full of bullets and the rifle was fully functional. The police discovered "the top cartridge that was to be fired was at an angle that caused the gun to jam," but the problem could rapidly be resolved by simply taking off and reinserting the magazine clip. Moreover, there was evidence the defendant knew how to quickly take off and reinsert the clip. (*Ibid.*) *Ranson* held that under those particular circumstances, the trial court did not abuse its discretion in denying the defendant's motion for acquittal under section 1118. (*Ranson,*

supra, at pp. 321-322.) *Ranson* concluded: "We are slightly … removed from 'immediate' in the instant case; however, we hold that the conduct of appellant is near enough to constitute 'present' ability for the purpose of an assault." (*Id.* at p. 321.)

Unlike *Ranson*, where the evidence showed the rifle at issue was functional despite a momentary jam, here there was no evidence the revolver used by Chapa was potentially functional at all. Chapa asked for money but never verbally threatened to shoot Khalid. Khalid testified that Chapa pulled the trigger and said he saw or heard the hammer fall. However, Khalid was unable to say whether the cylinder of the gun was moving. In addition, Chapa tried to manually turn the cylinder but appeared frustrated. Finally, rather than continuing his attempts to fire, Chapa ran away from the store without taking any money. Under the totality of the circumstances—including Chapa's attempt to manipulate the cylinder and his reference to the gun as "stupid"—there is no substantial evidence from which to conclude that the gun, even if loaded, was operable at the time, such that Chapa had the present ability to shoot Khalid.

Our Supreme Court has cautioned that a reviewing court must conduct its appraisal of the sufficiency of the evidence to support a conviction "'in the light of the whole record,'" rather than relying only on "'isolated bits of evidence selected by the respondent.'" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577.) In addition, substantial evidence "must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644; see *People v. Bassett* (1968) 69 Cal.2d 122, 139 ["The prosecution's burden is a heavy one: 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.'"].) Here the record, taken as a whole, does not disclose substantial evidence to show that the gun was both loaded and

operable and, in turn, that Chapa had the present ability to shoot Khalid.[4] The assault with a firearm conviction is therefore reversed.[5]

Sufficiency of Evidence to Support Chapa's Conviction for Attempted Murder

Chapa also challenges the sufficiency of the evidence to support his conviction for attempted murder. We conclude the evidence was sufficient to support Chapa's attempted murder conviction.

The elements of attempted murder are: (1) The defendant took at least one direct but ineffective step toward killing another person; and (2) the defendant specifically intended to kill that person. (See CALCRIM No. 600; *People v. Guerra* (1985) 40 Cal.3d 377, 386 [specific intent to kill is required for attempted murder].) "A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (CALCRIM No. 600.) In addition, """'[s]pecific intent to kill is a necessary element of attempted murder. It must be proved, and it cannot be inferred merely from the commission of another dangerous crime.'""" (*People v. Swain* (1996) 12 Cal.4th 593, 604-605.) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.'" (*People v. Smith* (2005) 37 Cal.4th 733, 739].) Express malice is shown when the defendant "'either desires the victim's death, or

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[4] There was no evidence that Chapa threatened or attempted to use the gun as a bludgeon.

[5] We are also concerned that the jury may not have understood that it was required to find the gun was loaded and operable in order to convict Chapa of assault with a firearm. The standard instruction given here did not clarify that the gun must be loaded and operable, stating only that defendant must have had the present ability to apply force with the gun. Moreover, the instruction given immediately after the instruction on assault with a firearm was the personal-use-of-a-firearm enhancement instruction, which specified that (1) the gun did *not* have to be in working order, so long as it was designed to shoot and *appeared* capable of doing so, and (2) the gun did *not* have to be loaded.

knows to a substantial certainty that the victim's death will occur.'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217.) "[E]vidence of motive is often probative of intent to kill." (*Smith, supra*, at p. 741.) Intent "may in many cases be inferred from the defendant's acts and the circumstances of the crime." (*Ibid.*)

Here, Chapa stood across a counter from Khalid. He pointed a gun at Khalid and asked for the money in Khalid's pocket. When Khalid failed to turn over the money, Chapa pulled the trigger; he did so three distinct times during the incident. Khalid was familiar with revolvers, having owned one in the past. Moreover, upon trying to grab the gun from Chapa, he momentarily touched it. He testified the gun was made of metal and was a real gun. It was not a plastic replica (Khalid was unaware of replica guns made of metal). In addition, although Chapa never verbally threatened to shoot or kill Khalid, he showed frustration when the gun failed to fire after he pulled the trigger. The entire incident happened very quickly.

Although Chapa used the gun to facilitate an attempted robbery, a rational jury could further find, beyond a reasonable doubt, that Chapa (1) specifically intended to kill Khalid and (2) took a direct but ineffective step towards actually killing him.[6] (See *People v. Camodeca* (1959) 52 Cal.2d 142, 145 ["'In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end.'"]; *People v. Siu* (1954) 126 Cal.App.2d 41, 43-44 ["'If there is an *apparent ability* to commit a crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are in fact unsuitable, or because of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim, or by a third person.'" (italics added)]; also see *In re Ryan N.* (2001) 92

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6 Chapa does not dispute on appeal that the gun was real, and, in any event, the jury could reasonably have inferred, based on the evidence, that the gun was real.

Cal.App.4th 1359, 1384 [conviction for attempted commission of assisted suicide proper where the defendant encouraged person to take pills that were not in fact lethal].)

We recognize that had Chapa actually fired a shot towards Khalid, the evidence supporting the attempted murder conviction would clearly have been stronger. However, to the extent the evidence showed Chapa specifically intended, and believed, even if mistakenly, that he had the ability, to kill Khalid, the conviction for attempted murder was proper. (See *Chance*, *supra*, 44 Cal.4th at p. 1167 [unlike assault, "[o]ther criminal attempts, because they require proof of specific intent, may be more remotely connected to the attempted crime"].)

Trial Court's Imposition of Fine Under Section 1202.5

The trial court imposed, at sentencing, a $10 "local crime prevention programs" fine pursuant to section 1202.5, subdivision (a). Section 1202.5, subdivision (a), states in part, "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, subdivision (a) of Section 487a, or Section 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." The court evidently imposed the fine on account of Chapa's conviction for attempted robbery. However, both parties agree the fine should be stricken because Chapa was not convicted of a crime enumerated in section 1202.5, subdivision (a). (See *People v. Jefferson* (2016) 248 Cal.App.4th 660, 663 [striking § 1202.5 fine imposed for attempted robbery].) Accordingly, we will strike the $10 fine imposed here.

Firearm Enhancement Under Section 12022.53, Subdivision (b)

Senate Bill No. 620 (2017-2018 Reg. Sess.), signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

> The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to

> be imposed by this section. (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The new legislation thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the trial court imposed, in connection with count 1 (attempted murder), a mandatory 10-year firearm enhancement under section 12022.53, subdivision (b). In addition, as to count 3 (attempted robbery), the court imposed one-third of the mandatory 10-year enhancement under section 12022.53, subdivision (b), i.e. three years four months. Chapa argues the amendment to section 12022.53 is retroactively applicable to his case under *In re Estrada* (1965) 63 Cal.2d 740, 745, because it potentially mitigates punishment. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [applying Sen. Bill No. 620 to case not yet final when law became effective]; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].) The People concede the amendment is retroactive under *Estrada*.

The People contend, however, that remand for resentencing is not necessary in this instance because the sentencing court's failure to apply the new law was essentially harmless, in view of the seriousness of the offense and the trial court's denial of Chapa's *Romero* motion to dismiss his prior strike. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).)

The People cite *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), in which the Court of Appeal, relying on comments made by the trial court at the sentencing hearing, declined to remand for resentencing after the courts gained discretion to strike prior strikes under *Romero*. In *Gutierrez*, the trial court had exercised its discretion not to strike a different enhancement, commenting that it did not believe the defendant's sentence should be shortened. (*Gutierrez*, *supra*, at p. 1896.) Although, *Gutierrez* did not remand for resentencing in light of the trial court's comments, it nonetheless clarified that remand was necessary "unless the record show[ed] that the sentencing court *clearly*

indicated that it would not, in any event, have exercised its discretion to strike the [enhancement] allegations." (*Ibid.*, italics added.)

People v. McDaniels (2018) 22 Cal.App.5th 420 (*McDaniels*), applied the *Gutierrez* approach to the defendant's request for remand for resentencing in light of Senate Bill No. 620. *McDaniels* remanded the case for resentencing because "the record contain[ed] no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements" under the amendments effected by Senate Bill No. 620. (*McDaniels, supra,* at p. 448; see *People v. Almanza* (2018) 24 Cal.App.5th 1104 [adopting the *McDaniels* approach and remanding to allow trial court to reconsider the sentence in light of the amendments to the firearm enhancement statutes].)

McDaniels'*s* approach is further supported by a California Supreme Court case, also called *Gutierrez,* i.e., *People v. Gutierrez* (2014) 58 Cal.4th 1354. There, at the time of sentencing, the governing law contained a *presumption* that juvenile defendants found guilty of specific crimes under certain circumstances would be sentenced to LWOP terms. A change in the law, which was held to apply retroactively to cases still pending on direct appeal, dictated that this presumption be removed, thus increasing the scope of the trial court's sentencing discretion. Our Supreme Court held that, for defendants sentenced under the former law but to whom the new law applied retroactively, "the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*Id*. at p. 1391.) Our Supreme Court emphasized, "'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.'" (*Ibid.*)

We agree with the *McDaniels* approach. Unless the sentencing court clearly indicated it would not have struck the enhancements in question if it could, determining what it would likely have done had it possessed the new discretion, is an inherently speculative enterprise. Here, at the time of sentencing, the firearm enhancement under section 12022.53, subdivision (b), was mandatory, and the court imposed such enhancements as to counts 1 and 3 without comment. As for the punishment for the underlying offenses themselves, the court imposed the middle term for the attempted murder conviction and one-third the middle term for the attempted robbery conviction. Given this record, as well as the new sentencing environment created by the amendment to the applicable firearm enhancement statute, we cannot be confident the same sentence would have been imposed had the law been as it is now. Accordingly, remand is appropriate.

Serious Felony Enhancement Under Section 667, Subdivision (a)

Senate Bill No. 1393 (2017-2018 Reg. Sess.), which was signed by the Governor on September 8, 2018, and becomes effective on January 1, 2019, gives "courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965, 971. (*Garcia*).)

Here, the trial court found true the section 667, subdivision (a) prior serious felony conviction alleged in the information and imposed the statutorily-mandated consecutive five-year sentence when it sentenced Chapa on January 19, 2017. (See *Garcia*, *supra*, 28 Cal.App.5th at p. 971.) At that time, imposition of the five-year sentence was mandatory. Section 667, subdivision (a) required imposition of prior serious felony enhancements in compliance with section 1385, subdivision (b), which in turn expressly precluded courts from striking prior serious felony convictions for sentencing purposes. (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Senate Bill No. 1393 amends both section 667, subdivision (a) and section 1385, subdivision (b) to delete restrictions on the

court's sentencing discretion to strike prior serious felony convictions for sentencing purposes. (See Stats. 2018, ch. 1013, §§ 1, 2.)

The parties agree that the amendments effected by Senate Bill No. 1393 are retroactively applicable to Chapa's case, which is pending final judgment.[7] (See *In re Estrada* (1965) 63 Cal.2d 740; *Garcia*, *supra*, 28 Cal.App.5th 961, 973.) The People contend, however, that remand is nonetheless not necessary, even under the "clearly indicated" standard discussed above, because the trial court denied Chapa's *Romero* motion to strike his prior strike conviction and declined to impose the low term for his attempted murder conviction. The People's argument is unpersuasive given that the trial court did not impose the maximum possible sentence in this matter, choosing instead to sentence Chapa to the middle term for his attempted murder conviction. In light of the court's imposition of the middle term for the attempted murder conviction, as well as our reversal of Chapa's conviction for assault with a firearm, we will remand to give the trial court the opportunity to exercise its newly-conferred discretion under sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393.

DISPOSITION

Chapa's conviction for assault with a firearm, in count 2, is reversed. Chapa's sentence is vacated. The case is remanded to the trial court for resentencing in light of (1) the reversal of the conviction in count 2; (2) section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (2017-2018 Reg. Sess., Stats. 2017, ch. 682, § 1); and (3) sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill

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[7] For purposes of determining the retroactivity of ameliorative amendments to criminal statutes, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*People v. Viera* (2005) 35 Cal.4th 264, 306; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.) Considering the 90-day period for seeking certiorari after finality of a state-court judgment (U.S. Supreme Ct. Rules, rule 13(1)), Senate Bill 1393 will necessarily apply to this case once it takes effect.

No. 1393 (2017-2018 Reg. Sess., Stats. 2018, ch. 1013, §§ 1, 2). The judgment is otherwise affirmed.

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SMITH, J.

I CONCUR:

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FRANSON, J.

DETJEN, Acting P.J., Concurring and Dissenting.

I respectfully dissent from that portion of the opinion in which the majority concludes Angel Mike Chapa's conviction for assault with a firearm must be reversed for insufficient evidence. In my view, the majority does not follow the standard of review it purports to apply.

It is settled that the test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) "If the circumstances reasonably justify the [trier of fact's] findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Instead, reversal is warranted only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.)[1] Because the statute requires a "present ability" to commit a battery, "[a] long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in

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[1] Further statutory references are to the Penal Code.

a threatening manner at another person. [Citations.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 (*Rodriguez*).) "However, the fact that the gun was loaded [and operable] may be inferred from circumstantial evidence, and we will uphold an assault conviction if the inference is reasonable. [Citation.]" (*People v. Penunuri* (2018) 5 Cal.5th 126, 147.)

I believe an inference the gun was loaded and operable reasonably can be drawn from the evidence in the present case, particularly the video recording of the incident that was played for the jury. The video, taken together with the victim's testimony, showed Chapa pulled the trigger three times. When the gun did not fire, he did something with the hammer, did something on the side of the gun, and attempted to manipulate the cylinder by rotating it. He also called the gun "stupid."

"A defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a loaded weapon." (*Rodriguez*, *supra*, 20 Cal.4th at p. 13; see *People v. Mearse* (1949) 93 Cal.App.2d 834, 837; *People v. Montgomery* (1911) 15 Cal.App. 315, 317-319.) There would have been no reason for Chapa to pull the trigger and, when the gun did not fire, attempt to manipulate it and pull the trigger again, or to call the gun "stupid," if the gun were not loaded and operable, albeit jammed. From Chapa's attempt to rotate the cylinder, jurors reasonably could infer Chapa knew how to clear the jam and ready the gun for firing, but simply did not have time to do so before the victim grabbed for the weapon. (See *People v. Valdez* (1985) 175 Cal.App.3d 103, 111; *People v. Ranson* (1974) 40 Cal.App.3d 317, 321.)

The "present ability" element of assault "is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion. Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected

position so that injury would not be 'immediate,' in the strictest sense of that term." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168, fn. omitted.) "[W]hen a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Id.* at p. 1172.)

I find patently unpersuasive the majority's attempt to demonstrate that "the normal presumption favoring the judgment was overcome." (*Rodriguez, supra,* 20 Cal.4th at pp. 11-12.) The majority fails to view the evidence in the light most favorable to the judgment, and focuses instead on the inferences it draws rather than the equally logical inferences the jury could have drawn. (See *id.* at p. 12.) The evidence — not merely conjecture, suspicion, or speculation (cf. *People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5 & 545, fn. 6; *People v. Redmond, supra,* 71 Cal.2d at p. 755) — is such that a rational juror reasonably could infer the gun was loaded and operable at the time Chapa pointed it at his victim. Accordingly, I would affirm Chapa's conviction for assault with a firearm.

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DETJEN, Acting P.J.